

EXHIBIT A

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA

3 IN RE: INCRETIN-BASED
4 THERAPIES PRODUCTS
5 LIABILITY LITIGATION

Case No. 13-md-2452-AJB-MDD

6 **STIPULATION AND ORDER**
7 **RELATED TO FILINGS BY**
8 **DERIVATIVE PLAINTIFFS**
9 **ACTING AS INTERIM ESTATE**
10 **REPRESENTATIVES**

11 *This Document Relates to All Cases*

Hon. Anthony J. Battaglia

12 On _____, 2014, the Plaintiffs' Steering Committee ("PSC") and
13 Defendants Eli Lilly and Company, Amylin Pharmaceuticals Inc., Merck Sharp &
14 Dohme Corp., and Novo Nordisk Inc. ("Defendants") filed a joint motion for approval
15 of a Stipulation concerning derivative plaintiffs acting as interim estate representatives
16 for a deceased Injured Party¹ under certain circumstances, as stipulated by the Parties.
17 The Parties have moved this Court to approve the stipulation and further order that
18 such stipulated Interim Estate Representatives have authority to execute authorizations
19 for the collection of medical and other records for all purposes in MDL 2452.

20 **ACCORDINGLY, WHEREAS** the Court finds that the PSC and Defendants
21 have stipulated as follows:

22 A. With respect to any action currently pending or hereafter directly filed or
23 transferred into this MDL, in the event a state or federal court of competent
24 jurisdiction has not appointed a person to serve as a representative for the estate and/or
25 beneficiaries of a deceased Injured Party --

26 (i) the person designated as the personal representative in the Will of

27 ¹ As defined in the Master Form Complaint for Damages (Doc. 206).

- 1 the decedent (if any); and/or;
- 2 (ii) the surviving spouse², with the consent of any and all children of
- 3 the decedent³, and anyone identified as the personal representative
- 4 in the Will (if any); and/or
- 5 (iii) a beneficiary who succeeds to a cause of action under the Will (if
- 6 any) or state intestate law, with the consent of any surviving
- 7 spouse, any adult children of the decedent, and anyone identified
- 8 as the personal representative in the Will (if any) --

9 may act as an Interim Estate Representative for all purposes related to the pre-trial

10 proceedings of any and all claims related to the Injured Party pending in MDL 2452.

11 B. Where the decedent Injured Party has minor children and/or beneficiaries,

12 defendants reserve the option of requiring the appointment of a person who is

13 formally qualified and/or appointed by another state or federal court to represent the

14 estate, with 90 days notice, and cause shown.

15 C. For cases currently pending in MDL 2452 (“Pending Case”), any party

16 seeking to act as an Interim Estate Representative for a deceased Injured Party shall

17 have 90 days from the date of this Order to serve on the defendants to such action a

18 Declaration in the form attached hereto as Exhibit A (where the Injured Party was

19 intestate) or Exhibit B (where the Injured Party had a Will). For cases transferred,

20 removed or directly filed in MDL 2452 after the date of this Order, any party seeking

21 to act as an Interim Estate Representative for a deceased Injured Party shall have 90

22 days from such transfer, removal or direct filing to serve on the defendants to such

23 action a Declaration in the form attached hereto as Exhibit A (where the Injured Party

24

25 ² As used herein, “surviving spouse” shall include a “surviving domestic partner” or similar status

26 where recognized under applicable state law as being a beneficiary of the estate.

27 ³ As used herein, “child” or “children” is limited to those children who are beneficiaries who

28 succeed to a cause of action under the Will (if any) or state intestacy law.

1 was intestate) or Exhibit B (where the Injured Party had a Will). Any such
2 Declarations shall require the signature of the party seeking to serve as Interim Estate
3 Representatives.

4 D. In the event an Injured Party dies after said plaintiff's case has been
5 removed, direct filed, or otherwise transferred to MDL 2452, plaintiff's counsel shall
6 promptly serve, in accordance with Fed. R. Civ. P. 25, a notice of said death with the
7 Court, and thereafter, shall have 90 days from the date of said filing to amend the
8 complaint naming: (1) a derivative plaintiff who is formally qualified and/or
9 appointed by another state or federal court to represent the estate of the Injured Party,
10 or (2) an Interim Estate Representative who must serve a Declaration in accordance
11 with the provisions of paragraph C, above. No provision of this Stipulation shall
12 preclude a defendant from filing a Suggestion of Death pursuant to Fed. R. Civ. P. 25
13 at any time.

14 E. Any objections to the sufficiency of a Declaration served in accordance
15 with Paragraph C or D of this Stipulation shall be identified with a deficiency notice
16 served upon the Interim Estate Representative's counsel and Plaintiffs' Co-Lead
17 Counsel in MDL 2452 within 30 days of the filing of the Declaration, or said
18 objections as may be discerned from the face of the Declaration are waived.

19 F. Upon timely notice of objection by counsel for any Defendant, the Interim
20 Estate Representative shall be given 30 days to cure or otherwise deny any alleged
21 deficiency in the Interim Estate Representative's Declaration. In the event the Interim
22 Estate Representative does not cure said deficiency, or advises Defendant that the
23 Interim Estate Representative's Declaration was filed consistent with this Order, then
24 Defendants shall exercise all reasonable efforts to meet-and-confer with the Interim
25 Estate Representative's counsel (for a period of at least 14 days). If, after the meet-
26 and-confer process, any objections remain unresolved, Defendants shall raise all
27 remaining objections in a motion to dismiss filed with the Court that shall be filed
28 within 120 days of the filing of the Declaration or the right to raise any objection with

1 respect to the status of the Interim Estate Representative under this Stipulation is
2 waived. Any motion to dismiss filed in this regard shall be without prejudice, on
3 Notice filed by ECF, and permit fourteen (14) days for an opposition, if any.

4 G. The appointment of an Interim Estate Representative under the provisions
5 of this stipulation shall be valid for eighteen months after the date of this order, at
6 which time the Federal Rules of Civil Procedure shall govern the capacity of a party to
7 sue. For purposes of relation back and application of the statute of limitations after
8 said date, all filings made by and all actions taken by an Interim Estate Representative
9 prior to said date shall be considered valid and effective.

10 H. Notwithstanding any other provision of this Stipulation, the filing of a
11 Motion to Amend the Complaint to replace the Interim Estate Representative with a
12 person who has the capacity to sue under the Federal Rules of Civil Procedure shall be
13 required (i) prior to trial of the action in this MDL proceeding, (ii) prior to
14 compromise of the claim, (iii) prior to any appeal taken; or (iv) upon remand or
15 transfer of the action to another state or federal court. Consistent with Federal Rules
16 of Civil Procedure 17(a)(3) and Rule 25, prior to the transfer of any case claiming
17 wrongful death and/ or survival actions to another venue, the Interim Estate
18 Representative shall have ninety (90) days, or more time for cause shown, in which to
19 file a Motion to Amend the Complaint to substitute a personal representative or other
20 party as the plaintiff in the action, if required. All rights of the defendants are
21 reserved with respect to responding to any Motion to Amend the Complaint. Upon the
22 granting of any motion to Amend the Complaint to replace the Interim Estate
23 Representative with a person who is formally qualified and or appointed by another
24 state or federal court to represent the estate of the Injured Party, the status of the
25 Interim Estate Representative under this stipulation shall cease. In the event a Motion
26 to Amend is not filed, or does not proffer a person who is formally qualified to
27 represent the estate in accordance with the terms of this paragraph, all rights and
28 defenses of the parties as to the pending Complaint are reserved.

1 I. For Pending Cases, the naming of an Interim Estate Representative in full
2 satisfaction of the terms of this Stipulation shall relate back to the date on which the
3 Complaint was filed, provided that the Complaint was originally filed by the party
4 who came to be the Interim Estate Representative, or by another person who could
5 have met the requirements to serve as Interim Estate Representative. Defendants will
6 not argue that the statute of limitations continued to run in the period after the initial
7 filing of a complaint but prior to the appointment of the Interim Estate Representative.

8 J. For cases filed after the date of this Order by a person who becomes an
9 Interim Estate Representative in full satisfaction of the terms of this Stipulation, the
10 Defendants will not argue that the statute of limitations continued to run after the
11 initial filing of the Complaint.

12 K. Nothing in this Stipulation shall be construed to waive any objection to
13 any applicable statute of limitations defense or any other defense based on timeliness
14 as to any claim asserted, or to be asserted, in connection with the alleged Injured Party
15 on any ground other than as set forth in Paragraphs I and J above. Nothing in this
16 Stipulation may be construed as a waiver, to any extent, as to any party, with respect
17 to any action not pending or subsequently transferred to, or filed in, this MDL
18 proceeding.

19 L. This Stipulation may be terminated on sixty (60) days' notice by any
20 Party, and this Stipulation shall, upon such termination, not be applicable with respect
21 to any subsequent case filed or transferred into this MDL, but such termination shall
22 not have retroactive effect with respect to any case filed or transferred prior to its
23 termination.

24 **NOW THEREFORE** this Court approves this Stipulation and further
25 **ORDERS:**

26 1. The Court further holds and otherwise appoints the Interim Estate
27 Representative to be the "personal representative," as defined in the Health Insurance
28 Portability and Accountability Act ("HIPAA"), of the Injured Party's estate. A

1 “personal representative” is “an executor, administrator, or other person [who] has
2 authority to act on behalf of a deceased individual or of the individual’s estate.” 45
3 CFR 164.502(g)(4).

4 2. Moreover, this Court finds that a Declaration signed by the Interim Estate
5 Representative is sufficient and appropriate to be relied upon by all covered entities,
6 as defined in the Health Insurance Portability and Accountability Act (“HIPAA”) 45
7 CFR Parts 160 and 164, which includes all physicians, hospitals, pharmacies, or other
8 health providers or practices, to disclose the Injured Party’s records to the Interim
9 Estate Representative and or to any other person, party, or entity who receives a
10 records request or release signed by the Interim Estate Representative.

11 3. Nothing herein is intended to limit any rights under Federal Rules of
12 Civil Procedure 17, 21 or 25 with regard to the substitution of plaintiffs.

13
14 **IT IS SO ORDERED.**

15
16 DATED: _____

Honorable Anthony J. Battaglia
United States Judge

EXHIBIT A

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA

3 {Individual Case Caption}

4 Cause No. _____
5

6 **DECLARATION OF PROPOSED**
7 **INTERIM ESTATE**
8 **REPRESENTATIVE**
9 **(INTESTATE DECEDENT)**
10
11

12
13 I, [NAME OF DECLARANT (“declarant”), declare as follows:

14 1. I am over the age of 18 years. I have personal knowledge of the facts
15 contained in this declaration, and if called as a witness I could and would testify
16 competently to the truth of the facts stated herein.
17

18 2. I am the [RELATIONSHIP] of [NAME OF DECEDENT]
19 (“decendent”) who died on [INSERT DATE OF DEATH], in [CITY], [STATE].
20

21 The decedent died intestate and I am a beneficiary of the estate who succeeds to a
22 cause of action. The other beneficiaries are [NAMES OF HEIRS].
23

24 3. With respect to any surviving spouse and/or surviving children of the
25 decedent who succeeds to a cause of action [*Must select one of the three below*]:

26 ☐ Any surviving spouse and all surviving children are among those
27 identified in paragraph 2, above;
28

OR

☐ To the extent not among those identified in paragraph 2, the surviving spouse and/or surviving children are [NAMES OF SURVIVING SPOUSE AND/OR SURVIVING CHILDREN]

OR

☐ The decedent had no surviving spouse and no surviving children.

4. With respect to minor children:

☐ None of the surviving children or beneficiaries identified in paragraphs 2 and/or 3, above, are minor children;

OR

☐ The following surviving children or beneficiaries are minor children, and their age and relationship to the decedent are as noted.

Name: _____

Age: _____

Relationship: _____

5. No proceeding is now pending or has been filed at any time in the past in any state or federal court for administration of the decedent's estate.

6. All persons identified in paragraphs 2 and 3 above consent to my appointment as the Interim Estate Representative for the decedent's estate in accordance with the Order of this Court dated _____, 2014.

7. No other person has a superior right to commence the action or

1 proceeding or to be substituted for the decedent in the pending action or
2 proceeding.

3
4 8. A certified copy of the decedent's death certificate is attached hereto.

5 Executed on the [DAY] of [MONTH], 20____.

6
7 9. I declare under penalty of perjury under the laws of the United States
8 that the foregoing is true and correct.

9
10 Executed on the ____ day of the _____ Month, 20____.

11
12
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14 _____
15 **[NAME OF DECLARANT]**
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EXHIBIT B

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA

3 {Individual Case Caption}

4 Cause No. _____
5

6 **DECLARATION OF PROPOSED**
7 **INTERIM ESTATE**
8 **REPRESENTATIVE**
9 **(TESTATE DECEDENT)**
10
11

12
13 I, [NAME OF AFFIANT] (“affiant” or “declarant”), declare as follows:

14 1. I am over the age of 18 years. I have personal knowledge of the facts
15 contained in this declaration, and if called as a witness I could and would testify
16 competently to the truth of the facts stated herein.
17

18 2. I am the [RELATIONSHIP] of [NAME OF DECEDENT]
19 (“decedent”) who died on [INSERT DATE OF DEATH], in [CITY], [STATE],
20 and *[Must select one of the two boxes below]:*
21

22 ☐ I am a named beneficiary of the will of the decedent. The other
23 named beneficiaries who succeed to a cause of action under the Will are
24 [NAMES OF HEIRS].
25

26 **OR**
27

28 ☐ I am the sole beneficiary named in decedent’s will.

1 **OR**

2 ☐ I am authorized by the decedent's will to act on behalf of the
3
4 decedent's beneficiary or beneficiaries with respect to the decedent's interest in
5 this action or proceeding. The named beneficiary or beneficiaries who succeed to
6 a cause of action under the Will are [NAMES OF HEIRS].
7

8 3. With respect to any surviving spouse and/or surviving children of the
9 decedent [*Must select one of the three boxes below*]:

10 ☐ Any surviving spouse and all surviving children are among those
11 identified in paragraph 2, above;
12

13 **OR**

14 ☐ To the extent not among those identified in paragraph 2, are as
15 follows [NAMES OF SURVIVING SPOUSE AND/OR SURVIVING
16 CHILDREN]
17

18 **OR**

19 ☐ The decedent had no surviving spouse and no surviving children.
20

21 4. The decedent's Personal Representative as identified in the Will is
22

23 _____.

24 5. With respect to minor children:

25 ☐ None of the surviving children or beneficiaries identified in
26 paragraphs 2 and/or 3, above, are minor children;
27

28 **OR**

☐ The following surviving children or beneficiaries are minor children,
and their age and relationship to the decedent are as noted.

Name: _____

Age: _____

Relationship: _____

6. No proceeding is now pending or has been filed at any time in the
past in any state or federal court for administration of the decedent's estate.

7. All persons identified in paragraphs 2 and 4 above consent to my
appointment as the Interim Estate Representative for the decedent's estate in
accordance with the Order of this Court dated _____, 2014.

8. No other person has a superior right to commence the action or
proceeding or to be substituted for the decedent in the pending action or
proceeding.

9. A certified copy of the decedent's death certificate is attached hereto.
Executed on the [DAY] of [MONTH], 20__.

10. I declare under penalty of perjury under the laws of the United States
that the foregoing is true and correct.

Executed on the ____ day of the _____ Month, 20__.

[NAME OF DECLARANT]